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February 7, 2005

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213194

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, DC 20423-0001

ENTERED
Office of Proceedings

FEB - 7 2005

Part of
Public Record

Re: Docket No. 42088, Western Fuels Association, Inc. and Basin
Electric Power Cooperative, Inc. v. BNSF Railway Company,
f/k/a The Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

Enclosed for filing please find an executed original and ten (10) copies of
Complainants' Reply to Defendant's Motion Concerning Rerouted Traffic.

Please date stamp the extra copy of this cover letter and the enclosed
pleading and return it to our messenger. Thank you for your attention to this matter.

Respectfully submitted,



John H. LeSeur
An Attorney for
Western Fuels Association, Inc. and
Basin Electric Power Cooperative, Inc.

JHL:cef
Enclosures

213194

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

WESTERN FUELS ASSOCIATION, INC.
and BASIN ELECTRIC POWER
COOPERATIVE, INC.

Complainants,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42088

**COMPLAINANTS' REPLY TO
DEFENDANT'S MOTION
CONCERNING REROUTED TRAFFIC**

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Public Record

WESTERN FUELS ASSOCIATION, INC., and
BASIN ELECTRIC POWER COOPERATIVE, INC.

OF COUNSEL:

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Dated: February 7, 2005

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Attorneys for Complainants

WESTERN FUELS ASSOCIATION, INC. and BASIN ELECTRIC POWER COOPERATIVE, INC.)	
)	
)	
Complainants,)	
)	
v.)	
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

Docket No. 42088

Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively “WFA/Basin”) hereby reply in opposition to Defendant BNSF Railway Company’s (“BNSF”) motion concerning rerouted traffic (“Motion”). BNSF filed this Motion on January 28, 2005.

BNSF’s Motion asks the Board to issue an order “requiring that if [WFA/Basin] include rerouted traffic in their [Stand Alone Cost, ‘SAC’] presentation, they must posit on opening two stand-alone railroad (‘SARR’) configurations: one that includes no rerouted traffic and one that includes the rerouted traffic.” Motion at 2.

BNSF's Motion should be summarily denied. The law is clear that a complainant shipper can select a single SARR traffic group to present in its opening

evidence. Moreover, if WFA/Basin elect to include rerouted traffic in their SARR, BNSF's proposed dual SARR presentations will exponentially add to WFA/Basin's litigation costs and needlessly complicate this case.

**I.
THE RELIEF REQUESTED BY BNSF WOULD
UNDERMINE WFA/BASIN'S RIGHT
TO SELECT ITS SARR TRAFFIC GROUP**

The Coal Rate Guidelines¹ set forth several bedrock SAC principles, including the principle that a complainant shipper can select its SARR traffic group. Id. 542-43. This principle is fundamental because, under the SAC test, a shipper is allowed to present a SARR plan, including a SARR traffic group, that produces the "least cost ... feasible" SARR. Id. at 542. For a shipper to obtain the least cost result, the shipper must control selection of its SARR traffic group.

The Board's subsequent decisions applying the Guidelines have repeatedly reaffirmed a shipper's fundamental right to select its traffic group. See, e.g., West Texas Utilities Co. v. Burlington Northern R.R., 1 S.T.B. 638, 655 (1996) ("[t]o make a SAC presentation, a shipper designs a hypothetical new carrier ... that is specifically tailored to serve an optimum traffic group"); Wisconsin Power and Light Co. v. Union Pacific R.R., STB Docket No. 42051 (STB served Sept. 13, 2001) at 12 ("[t]o make a SAC presentation, a shipper designs an SARR specifically tailored to serve an identified traffic

¹ Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) ("Coal Rate Guidelines"), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3rd Cir. 1987).

group”); Public Service Co. of Colorado v. Burlington Northern and Santa Fe Ry., STB Docket No. 42057 (STB served June 8, 2004) (“PSCo”) at 11 (same).

BNSF’s Motion asks the Board to strip away a complainant shipper’s fundamental right to select its least cost traffic group. A shipper that includes rerouted traffic in its SARR does so for a reason – the shipper believes that it will produce the least cost result. Requiring a shipper to present an alternate SARR – without rerouted traffic – will, by definition, require a shipper to present an SARR alternative that is not the least cost alternative.

BNSF appears to argue that its requested relief is justified because a shipper may never include rerouted traffic in a feasible SARR. See Motion at 8 (“[t]he experience in the recent SAC cases indicates that it is reasonable to assume that complainants will eventually need to submit evidence relating to a scenario in which no rerouted traffic is included in the SARR”). BNSF’s assertion finds no support whatsoever in the Board’s recent SAC decisions.

The Board has repeatedly held in its recent SAC decisions that complainant shippers can include rerouted traffic in their SARRs. The Board’s decisions in TMPA² and Duke/NS³ establish the principles the Board uses to determine the propriety of SAC reroutes. As summarized by the Board in Duke/NS:

² Texas Municipal Power Agency v. Burlington Northern and Santa Fe Ry., STB Docket No. 42056 (STB served March 24, 2003) (“TMPA”) at 21-22.

³ Duke Energy Corp. v. Norfolk Southern Ry., STB Docket No. 42069 (STB served Nov. 6, 2003)(“Duke/NS”) at 25-26.

As the Board held in TMPA, if a complainant wishes to reroute traffic in its SAC presentation without having the SARR operate overall of the rerouted portion of the move, it must ensure that the combined operations of the SARR and the residual carrier would be at least as efficient as the existing operations. At a minimum, the complainant must fully account for all of the ramifications of requiring the residual carrier to alter its handling of the traffic and any changes in the level of service received by the shippers.

The starting point for the Board's analysis for rerouted traffic will be length of haul. If a rerouting shortens the distance, the Board will presume it is acceptable, unless the defendant railroad demonstrates otherwise. The presumption will change for reroutings that result in a longer overall haul. A longer route is not necessarily less efficient, as increased densities and other operational efficiencies may offset the additional distance-related costs. But a logical presumption is that longer routes are generally less efficient than shorter ones; and the greater the disparity in distance, the stronger that presumption.

Id. at 26.

BNSF's Motion also implies that if a shipper includes rerouted traffic, it will always misapply the Board's principles governing SARR traffic reroutes. Again BNSF is wrong. The recent PSCo case is instructive. In PSCo, the shipper proposed a traffic group that included a single rerouted traffic movement. The Board found that inclusion of the rerouted traffic was permissible under the standards enunciated in TMPA and Duke/NS. See PSCo at 19-23. However, complications arose because BNSF stubbornly refused to model the traffic group the shipper proposed and the Board accepted. Id. at 23.⁴

⁴ The other cases cited by BNSF are inapposite. The complainant shippers in Duke/NS, and the two other eastern cases, submitted their opening evidence prior to the Board's first major decision setting the standards governing traffic reroutes, the TMPA

If BNSF's Motion is granted, BNSF will be encouraged to continue to challenge the Board's decisions approving a shipper's right to use properly rerouted traffic. Conversely, denial of BNSF's Motion will reaffirm these decisions and reaffirm a bedrock Coal Rate Guidelines principle – the shipper can select its traffic group.

**II.
GRANTING BNSF'S REQUESTED RELIEF MAY
SIGNIFICANTLY ADD TO WFA/BASIN'S LITIGATION
COSTS AND UNNECESSARILY COMPLICATE THIS CASE**

BNSF argues that granting its Motion will “simplify” and “expedit[e]” this case. Motion at 3. Instead, the exact opposite will occur if WFA/Basin decide to include rerouted traffic in their SARR. WFA/Basin are now actively engaged in developing their SARR. As the Board should expect at this stage of this case, WFA/Basin have not finalized their SARR composition. Obviously, if WFA/Basin decide not to include rerouted traffic in their SARR, BNSF's motion is moot.

Conversely, if WFA/Basin decide to include rerouted traffic in their SARR, and BNSF's Motion is granted, WFA/Basin will have to present two SARRs on opening. This dual presentation will require substantial time and effort since WFA/Basin will have to submit two different SARR configurations, two different engineering plans, two different operating plans, etc.

decision served on March 24, 2003. Similarly, the complainant shipper in Otter Tail Power v. Burlington Northern and Santa Fe Ry. (STB Docket No. 42071) submitted its opening evidence prior to the Board's second major decision on traffic reroute standards, the Duke/NS decision served on November 6, 2003. Unlike the shippers in those cases, WFA/Basin does have the TMPA and Duke/NS decisions to use as guides in submitting its opening evidence. WFA/Basin also can avoid the RTC modeling issues that have led to post-rebuttal filings in AEP Texas North Co. v. Burlington Northern and Santa Fe Ry., STB Docket No. 41191 (Sub No. 1).

WFA/Basin will incur substantial costs in presenting one SARR. Requiring WFA/Basin to present two SARRs will exponentially add to WFA/Basin's litigation costs. Nor, as discussed above, is there any reason for WFA/Basin to incur these excess costs. WFA/Basin are familiar with the Board's rulings in TMPA and Duke/NS and will use those rulings to guide them in their use of rerouted SARR traffic, if they decide to use rerouted traffic.

The Board should deny carrier motions – such as the instant one – that ask the Board to unnecessarily increase a shipper's litigation costs. This result is particularly important here. WFA/Basin have already been saddled with massive, unprecedented rate increases that they have no choice to pay during the pendency of this litigation. See WFA/Basin Complaint at ¶12 (filed Oct. 19, 2004). Thus, during the pendency of this case, WFA/Basin must pay both BNSF's vastly excessive prices and its already substantial litigation costs.

Denying BNSF's Motion will also serve other public interests. BNSF has an obvious tactical incentive to discourage shippers from pursuing rate cases by establishing extraordinarily high common carrier rates. If that fails, BNSF has every incentive to drive up a shipper's litigation costs. This strategy – if successful – not only hurts WFA/Basin here, it serves as a deterrent to other shippers who might otherwise bring meritorious cases to the Board. See General Accounting Office, Railroad Regulation: Current Issues Associated With the Rate Relief Process, GAO/RCED 99-46 (Feb. 1999) at 49 (citing shippers' fears of carrier rate retaliation and the high cost of SAC cases as principal factors that discourage shippers from pursuing SAC cases).

CONCLUSION

For reasons set forth above, WFA/Basin request that the Board deny
BNSF's Motion.

Respectfully submitted,

WESTERN FUELS ASSOCIATION, INC., and
BASIN ELECTRIC POWER COOPERATIVE, INC.

OF COUNSEL:

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Dated: February 7, 2005

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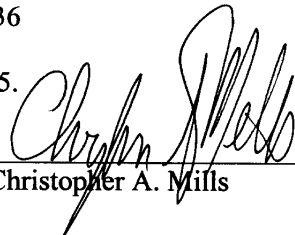
Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify I have this date served a copy of the foregoing Reply on the following Washington counsel for the Defendant by hand-delivery:

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Dated this 7th day of February, 2005.



Christopher A. Mills